March 5, 2012

Supreme Court Orders Reargument on the Extraterritorial Reach of the Alien Tort Statute

In a highly unusual action taken today, the Supreme Court of the United States ordered reargument in *Kiobel* v. *Royal Dutch Petroleum*, No. 10-1491, a case that, as originally argued to the Court last Tuesday, involved the relatively narrow question of whether corporations may be sued for human-rights violations under the Alien Tort Statute, 28 U.S.C. § 1350. Today's order directs the parties to brief and to argue a more fundamental question: whether *any* person, corporate or natural, may be sued under the ATS "for violations of the law of nations occurring within the territory of a sovereign other than the United States."

Kiobel typifies the spate of recent ATS lawsuits seeking to hold multinational corporations liable for allegedly aiding and abetting human-rights abuses committed by foreign governments against their own citizens on their own soil. The United States Court of Appeals for the Second Circuit in *Kiobel* agreed with one of the principal arguments made by defendants for the dismissal of these cases: that customary international law and federal common law do not recognize corporate liability for human-rights offenses. The correctness of this holding was the specific issue that the Supreme Court originally agreed to hear in *Kiobel*.

But other defendants in other cases have raised a more fundamental question, that of the ATS's territorial scope. Relying on the Supreme Court's extraterritoriality precedents, including, most recently, *Morrison* v. *National Australia Bank*, 130 S. Ct. 2869 (2010) (see our memo here), they have argued that the ATS creates *no* jurisdiction *at all* over claims for international-law torts that take place in foreign countries. Two courts of appeals, the District of Columbia Circuit and the Ninth Circuit, recently rejected that argument over strong dissents, and, after the Supreme Court had already granted certiorari in *Kiobel*, the defendants in the Ninth Circuit case urged the Court to hear this broader question of extraterritoriality. In their petition for certiorari in *Rio Tinto plc* v. *Sarei*, No. 11-649 (which was presented at the Court's private conference last Friday, three days after the *Kiobel* argument), these defendants quite rightly pointed out that the myriad difficulties presented by ATS litigation would persist even if the Court ruled against corporate ATS liability: "plaintiffs will simply sue individual officers and directors, and the problems will still remain."

Last Tuesday's argument in *Kiobel* and today's order make clear that a majority of the Court now agrees that the extraterritoriality question is the paramount one. In the *Kiobel* argument, Justice after Justice raised the issue: Is it "irrelevant," asked Justice Kennedy, that "'[n]o other nation in the world permits [suit for] alleged extraterritorial human rights abuses to which the nation has no connection'"? "If there is no other country where this suit could have been brought," asked Chief Justice Roberts, "isn't it a legitimate concern that allowing the suit itself contravenes international law?" Justice Alito perhaps put the question most bluntly: "What business does a case like [this] have in the courts of the United States?" By its order today, the Court has now decided to answer these important questions, perhaps by the end of this year.

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